

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
LINDEN WALLERSON, *individually and  
on behalf of all other persons similarly  
situated,*

Plaintiffs,

- against -

RESORT NURSING HOME, INC., et al,

Defendants.  
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**REPORT AND  
RECOMMENDATION**

07 CV 4775 (CPS)

The parties in the above-captioned Fair Labor Standards Act case have proposed a Notice of Lawsuit (the "Notice"), and a form Consent to Become Party Plaintiff (the "Consent") to be distributed to potential class members to notify them of the existence of this lawsuit and to provide information on their opt-in rights. Following a referral from the district court, this Court met with counsel and discussed certain issues with respect to the initial proposed Notice. In conformity with that discussion, the parties have made certain changes in the Notice as follows:

1) In the Introduction section, the parties have revised the second paragraph to define the class as Respiratory Therapists, who worked for Resort Nursing Home from December 19, 2004 to the present.

2) In Section II, the parties have altered the Notice so that it designates a particular date by which the class members must send in the Consent forms. In the current draft of the Notice, the date by which Consent forms must be received is July 14, 2008, calculated as 60 days from Thursday, May 15, 2008. If the Notice is not approved or the defendant is unable to supply plaintiff with the appropriate names and addresses of potential class members, this date will be adjusted accordingly.

3) In the first paragraph of Section III, the original draft Notice contained a provision requiring the opt-in plaintiffs to be deposed in New York County. That provision was altered so that the depositions can be held a place to be agreed upon depending on what is most convenient for the opt-in plaintiff.

4) In the third paragraph of Section III, the original draft Notice provided for the filing of "appropriate documents" with the Court. That provision was clarified to indicate that plaintiffs wishing to represent themselves or be represented by counsel of their choice must file the Consent directly with the Court.

Having reviewed the revised Notice and the form Consent, this Court respectfully recommends that the Notice be approved and that the parties be permitted to send the Notice and Consent to prospective class members.

Any objections to this Report and Recommendation must be filed with the Clerk of the Court, with a copy to the undersigned, within ten (10) days of receipt of this Report. Failure to file objections within the specified time waives the right to appeal the District Court's order. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), 72(b); Small v. Secretary of Health and Human Servs., 892 F.2d 15, 16 (2d Cir. 1989).

The Clerk is directed to send copies of this Report and Recommendation to the parties either electronically through the Electronic Case Filing (ECF) system or by mail.

**SO ORDERED.**

Dated: Brooklyn, New York  
May 13, 2008

s/Hon. Cheryl L. Pollak

  
Cheryl L. Pollak  
United States Magistrate Judge

*The parties having notified the Court that they agree to the terms of the proposed notice as set forth above, the Report and Recommendation is adopted.*

*So Ordered*

s/Hon. Charles P. Sifton

*5/13/08* *USDS*

# PELTON SERPE LLP

ATTORNEYS AT LAW

111 BROADWAY, 9<sup>TH</sup> FLOOR, NEW YORK, NY 10006

Phone: (212) 725-3600 | Fax: (212) 385-4600 | Website: [WWW.PELTONSERPE.COM](http://WWW.PELTONSERPE.COM)

May 15, 2008

## **NOTICE OF LAWSUIT**

### **I. INTRODUCTION**

The purpose of this notice is to inform you of the existence of a lawsuit against defendant RESORT NURSING HOME ("Resort") in the United States District Court for the Eastern District of New York. The Plaintiff alleges that Resort violated the Federal Fair Labor Standards Act by not paying eligible employees' time and one-half, or overtime compensation, for all hours worked in excess of 40 hours per week. The lawsuit is seeking back pay and double liquidated damages from Resort, as well as costs and attorney's fees to compensate such eligible employees. Resort denies the Plaintiff's allegations, and denies that it is liable to the Plaintiff for any of the back pay, damages, costs or attorneys' fees sought. In addition, although the Court has authorized Plaintiff's counsel to send this notice, the Court expresses no opinion regarding the merits of the claims in this case, if any. Plaintiff's claims and the claims of any person who joins the lawsuit may be subject to later dismissal if the Court finds that the claims lack merit or that the lawsuit cannot be litigated on a collective basis.

If you worked for Resort from December 19, 2004 to the present as a Respiratory Therapists and were not paid time and one-half for any work performed in excess of 40 hours per week, you may be eligible to join this lawsuit.

### **II. YOUR RIGHT TO JOIN THE CASE AND BE REPRESENTED BY PLAINTIFFS' COUNSEL**

If you fit within the definition above, you may join this case (that is, you may "opt-in") by completing and mailing the attached "Consent to Become Party Plaintiff" form to Plaintiff's counsel at the following address so that it is received no later than July 14, 2008:

#### **PLAINTIFF'S COUNSEL**

Brent E. Pelton, Esq.  
PELTON SERPE LLP  
111 Broadway, 9<sup>th</sup> Floor  
New York, New York 10006  
Telephone: (212) 725-3600; Facsimile: (212) 385-4600  
E-mail: [pelton@peltonserpe.com](mailto:pelton@peltonserpe.com)

If you fail to return the Consent to Become Party Plaintiff form to the Plaintiff's counsel such that it is received by Plaintiff's counsel no later than July 14, 2008, you may not be able to participate in this lawsuit.

### **III. EFFECT OF JOINING THIS CASE**

If you choose to join in this case, you will be bound by the Judgment, whether it is favorable or unfavorable. In addition, if you choose to join the case, you may be required to provide documents and answers to written interrogatories (questions) and to sit for a deposition. Furthermore, you should preserve any and all documents that may relate to your employment with Resort, including any compensation paid to you, any hours that you worked or any other information that relates to how you spent your time during the applicable period.

The attorney for the class plaintiffs is being paid on a contingency fee basis, which means that if there is no recovery there will be no attorney's fee. If there is a recovery, the attorney for the class will receive a part of any settlement obtained or money judgment entered in favor of all members of the class. If you sign and return the Consent to Become Party Plaintiff form attached to this Notice, you are agreeing to designate the class representative as your agent to make decisions on your behalf concerning the litigation, the method and manner of conducting this litigation, the entering of an agreement with Plaintiff's counsel concerning attorney's fees and costs, and all other matters pertaining to this lawsuit. These decisions and agreements made and entered into by the representative Plaintiff will be binding on you if you join this lawsuit. However, the Court has retained jurisdiction to determine the reasonableness of any contingency agreement entered into by the Plaintiff with counsel, and to determine the adequacy of the plaintiff's counsel.

Furthermore, you can join this lawsuit by representing yourself or by counsel of your own choosing by filing the attached Consent to Become Party Plaintiff. To do so, you or your attorney must file an "opt-in" consent form by July 14, 2008 directly with the Court.

### **IV. TO STAY OUT OF THIS CASE**

If you do not wish to be part of the lawsuit, you do not need to do anything. If you do not join the lawsuit, you will not be part of the federal claims portion of this case in any way and will not be bound by or affected by the result (whether favorable or unfavorable). Your decision not to join this case will not affect your right to bring a similar case on your own at a future time. However, claims under the Fair Labor Standards Act must be brought within 2 years of the date the claim accrues, unless the employer's violation of the law was "willful," in which case the claim must be brought within 3 years.

**V. NO RETALIATION PERMITTED**

Federal law prohibits Resort from discharging or in any other manner discriminating against you because you "opt-in" to this case, or have in any other way exercised your rights under the Fair Labor Standards Act.

**VI. YOUR LEGAL REPRESENTATION IF YOU JOIN**

If you choose to join this suit, and agree to be represented by the named Plaintiff through his attorney, your counsel in this action will be:

Brent E. Pelton, Esq.  
PELTON SERPE LLP  
111 Broadway, 9<sup>th</sup> Floor  
New York, New York 10006  
Telephone: (212) 725-3600; Facsimile: (212) 385-4600  
E-mail: [pelton@peltonserpe.com](mailto:pelton@peltonserpe.com)

William C. Rand, Esq.  
The Law Offices of William Coudert Rand  
711 Third Avenue, Suite 1505  
New York, New York 10017  
Telephone: (212) 28601425; Facsimile: (212) 599-7907  
E-mail: [wcrand@wcrand.com](mailto:wcrand@wcrand.com)

**VII. FURTHER INFORMATION**

Further information about this Notice, the deadline for filing a Consent to Become Party Plaintiff, or answers to questions concerning this lawsuit may be obtained by contacting Plaintiffs' counsel: (a) by telephone at (212) 725-3600; email at [pelton@peltonserpe.com](mailto:pelton@peltonserpe.com); or by writing at Pelton Serpe LLP, 111 Broadway, 9<sup>th</sup> Floor, New York, New York 10006.

Brent E. Pelton, Esq.  
PELTON SERPE LLP  
111 Broadway, 9<sup>th</sup> Floor  
New York, New York 10006  
(Phone) (212) 725-3600; (Fax)(212) 385-4600  
[pelton@peltonserpe.com](mailto:pelton@peltonserpe.com)

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X	
LINDEN WALLERSON, Individually, and on Behalf of	: ECF
All Other Persons Similarly Situated,	: 2007 Civ. 4775
	: .
Plaintiffs,	: .
	: .
-against-	: .
	: .
RESORT NURSING HOME, INC. d/b/a	: .
RESORT NURSING HOME, RESORT	: .
NURSING HOME, MICHAEL TENNENBAUM,	: .
And JOHN DOES # 1-10, Jointly and Severally,	: .
Defendants.	: .
-----X	

**CONSENT TO BECOME PARTY PLAINTIFF**

By my signature below, I hereby authorize the filing and prosecution of the above styled Fair Labor Standards Act action in my name and on my behalf by the above representative Plaintiff and so designate the collective class representative as my agent to make decisions on my behalf concerning the litigation, the method and manner of conducting this litigation, the entering of an agreement with the Plaintiffs' counsel concerning attorneys' fees and costs, and all other matters pertaining to this lawsuit.

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Street Address

\_\_\_\_\_  
Telephone

\_\_\_\_\_  
City, State, Zip code

\_\_\_\_\_  
Date

PLEASE RETURN THIS FORM FOR FILING WITH THE COURT BY \_\_\_\_ 2008  
TO:

Brent E. Pelton, Esq.  
PELTON SERPE LLP  
111 Broadway, 9<sup>th</sup> Floor  
New York, New York 10006  
(Phone) (212) 725-3600; (Fax)(212) 385-4600  
[pelton@peltonserpe.com](mailto:pelton@peltonserpe.com)  
Attorneys for Plaintiffs